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No. 356

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IN THE

Supreme Court of the United States

OIL, CHEMICAL AND ATOMIC WORKERS
INTERNATIONAL UNION,
LONG BEACH LOCAL No. 1–128,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD
and
MACMILLAN RING-FREE OIL COMPANY, INC.,

PETITIONER'S REPLY BRIEF

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I

THE COMPANY'S PRINCIPAL ARGUMENT SIMPLY BEGS THE QUESTION IN THIS CASE

Most of the Company's Brief is devoted to a recitation of the events which occurred in the six-month period immediately preceding the filing of the unfair labor practice charge. The company then argues that these events, when viewed in isolation, do not provide an adequate basis for the finding that the Company failed to bargain with the Union in good faith.

This argument begs the very question which this case presents. We do not challenge, in this Court, the conclusion of the court below that the evidence which

was drawn from the six-month limitations period, if examined in a vacuum, is insufficient to support the Board's unfair labor practice finding. But there was an abundance of other evidence in the record – evidence of events, statements, and actions which had occurred in the course of the nearly three years of negotiations which preceded the six-month period covered by the charge. The Board found that the true nature and purpose of the Company's actions within the limitations period became clear when those actions were viewed in the light and context of the Company's earlier behavior. It was on this basis that the Board found that the Company had failed to bargain in good faith within the six-month period preceding the filing of the charge.

The question which this case thus presents is whether Section 10(b) of the Act permits the Board to rely primarily on events which occurred outside the limitations period in order to determine the true nature and purpose of actions which occurred within that period, and which are alleged to violate the Act. The Court below answered this question in the negative. Other courts of appeals have answered it in the affirmative. (See cases cited at pp. 17-22 of the Petition.) This Court has previously refrained from deciding the question on the ground that it was not squarely presented. *Local 1424, Int'l Ass'n of Machinists v. NLRB*, 362 U.S. 411, 421-422 (1960). This case now does squarely present the issue, and we believe it should finally be decided.

II

THE COMPANY'S OTHER ARGUMENTS ARE BASED ON A FUNDAMENTAL MISCONCEPTION OF THE NATURE OF THE DUTY TO BARGAIN IN GOOD FAITH

The Company also seems to take the position that none of its actions within the six-month limitations period could possibly constitute an unfair labor practice,

even when viewed against the background of its earlier behavior. After all, the Company contends, it did not refuse to meet with the Union or engage in any delaying tactics or other manifestly improper actions within the limitations period. For a time the negotiations were suspended by mutual agreement of the parties; thereafter the parties did meet, and the Company made a proposal which the Union rejected. How, asks the Company, can its prior misconduct transform these later actions into a refusal to bargain?

This argument, of course, misconceives the nature of the statutory duty to bargain in good faith. As this Court itself has observed, "Collective bargaining . . . is not simply an occasion for purely formal meetings between management and labor, while each maintains an attitude of 'take it or leave it'; it presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract." *NLRB v. Insurance Agents*, 361 U.S. 477, 485 (1960). The "performance of the duty to bargain requires more than a willingness to enter upon a sterile discussion of union-management differences." *NLRB v. American National Insurance Co.*, 343 U.S. 395, 402 (1952). "'Good faith bargaining must be evinced by more than superficial efforts to negotiate a wage agreement. Good faith means sincerity, candor, and a willingness to negotiate toward the possibility of effecting compromises.'" *NLRB v. Generac Corp.*, 354 F. 2d 625, 628 (7th Cir. 1965).

The Board therefore had to determine whether the Company had, within the six-month period of limitations, bargained in good faith with a sincere desire to reach agreement, or whether it had simply engaged in a "sterile discussion," with the object and purpose of avoiding agreement. Perhaps it would not have been possible to answer this question solely on the basis of the evidence drawn from within the limitations period.

But when the Board compared the so-called "final offer" which the Company tendered to the Union within the limitations period with the Company's earlier proposals[1] and with the parties' prior contact, and when the Company's prior dilatory conduct and contemptuous attitude toward both the Union and the collective bargaining process were added to the picture, the Board had no difficulty finding that the Company's bargaining activities within the limitations period were a mere sham, and that it had made no sincere effort to reach an agreement.

It should be emphasized that the court below did not hold that the inferences and findings which the Board drew from the entire record were illogical or unwarranted by the evidence. It merely held, as a matter of law, that Section 10(b) precluded the Board from relying to the extent that it did on evidence which antedated the limitations period in order to ascertain the true purpose and nature of the Company's behavior within that period. This was the sole basis for the court's reversal of the Board's refusal-to-bargain finding. It is this holding which we believe should be reviewed by this Court.

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[1] The Company contends that "the only conclusion which may be reached from the events occurring during the limitation period is that *neither* party had retreated from its position taken three years prior on the non-economic items." (Co. Br. p. 8, emphasis in original). The basic point, however, is that the Board found that the position taken by the Company "three years prior" was not taken in good faith, but was deliberately designed to prevent the consummation of an agreement. Thus, the Company's failure to retreat from its earlier position, and its re-submission of the same contract proposals within the limitations period, is precisely what the Board found to constitute a failure to bargain in good faith.

III

THE BOARD'S BRIEF REFLECTS ITS OWN INABILITY TO SETTLE THE ISSUE PRESENTED IN THIS CASE

The Brief filed by the National Labor Relations Board requires little comment. While acknowledging, as it must, that the decision below was erroneous, the Board urges this Court to deny review because "the Board's decision in this case does not fully explicate the basis for its conclusion that 10(b) was not a bar . . ."

The position which the Board has taken here is merely a reflection of the confusion and inconsistency that has characterized the Board's attempts to interpret and apply Section 10(b). It appears that the Board is reluctant to urge that certiorari be granted because it would then be faced with the embarrassing task of reconciling its decision in the present case with some of its other decisions which appear to go in the opposite direction. The Board was confronted with a similar difficulty when it attempted before this Court to defend its decision in the *Machinists* case, *supra.*

Although we can sympathize with this problem, we submit that the Board's embarrassment – or even its failure to "fully explicate the basis for its conclusion" – is not a ground for denying the writ of certiorari. See, *e.g., NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438 (1965), where the Court granted certiorari and then, after argument on the merits, remanded the case to the Board in order to give it an opportunity to more fully explain its decision.

That case involved a Board determination as to the scope of an appropriate bargaining unit, a matter which the statute commits almost entirely to the Board's discretion. The present case, on the other hand, involves a

pure question of statutory construction. For this reason, we believe that this Court can resolve the issue in this case without the necessity of a remand. But even if the Court should feel otherwise, the appropriate disposition would be a reversal and remand, as in the *Metropolitan* case, not a denial of certiorari.

Respectfully submitted,

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